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No. 95-1228

# In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

*v.*

JERRY E. WELLS AND KENNETH R. STEELE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Section 1014 of Title 18 imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The question presented is whether the materiality of the false statement or report is an element of the offense described by Section 1014.

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 63 F.3d 745.

### JURISDICTION

The judgment of the court of appeals was entered on August 21, 1995. A petition for rehearing was denied on November 2, 1995. Pet. App. 21a. The petition for a writ of certiorari was filed on January 31, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 1014 of Title 18 provides:

> **Loan and credit applications generally; renewals and discounts; crop insurance.**
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as



> such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more that 30 years, or both.

## STATEMENT

Following a jury trial, respondents were convicted in the United States District Court for the Western District of Missouri of conspiring to violate 18 U.S.C. 1014 by making false statements to federally insured banks for the purpose of influencing the decisions of those banks, in violation of 18 U.S.C. 371 (Count One), and of making false statements to the O'Bannon Bank, a federally insured bank, for the purpose of influencing the decisions of that bank, in violation of 18 U.S.C. 1014 (Count Two).[1] Each respondent was sentenced to a two-year term of probation. The court of appeals vacated respondents' convictions and remanded to the district court for retrial. Pet. App. 20a.

1. In 1986, respondents and Jim Russell jointly purchased a business that leased and serviced copier equipment, and they renamed that business Copytech

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[1] Following the close of the evidence, the district court entered judgments of acquittal on two other counts, each of which alleged that respondents had made false statements to another bank. Pet. App. 6a.

Systems, Inc. The business had serious financial troubles. When respondents and Russell purchased the business, they assumed responsibility for more than $8 million in debts, in addition to a serious cash flow problem. To obtain cash to cover the shortage, respondents arranged for Copytech to sell to financial institutions Copytech's right to future payments under customers' copier leases. The financial institutions paid for the future rights with a lump-sum of cash. Pet. App. 2a-3a.

Copytech's need for cash led to the crimes charged in the indictment. Beginning in 1987, in order to obtain financing, respondents and Russell conspired to misrepresent the terms of Copytech's agreements with its customers to federally insured financial institutions.[2] The false representations related in part to the terms of a particular lease-and-service agreement that Copytech had with customers known as the "Copier Management Program" (CMP). Under that program, Copytech leased copier equipment and provided service and supplies for that equipment in return for a monthly fee covering both the lease payments and the cost of servicing the copiers. Under its financing agreements with banks, Copytech would assign a bank its right to receive customers' monthly fees; in return, the bank would provide Copytech with financing. Copytech would retain the obligation to pay the cost of servicing its customers' copiers as those costs were incurred. Pet. App. 4a-5a.

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[2] Before respondents' trial, Russell pleaded guilty pursuant to a plea agreement to one count of conspiring with respondents to make false statements to federally insured banks in violation of 18 U.S.C. 371, and to three counts of making false statements. Pet. App. 3a n.1. Russell testified against respondents at trial. *Id.* at 17a.



Respondents' conspiracy principally involved falsely representing to banks that Copytech did not have any ongoing service obligations to customers. Those false representations were made because two banks had required that Copytech maintain a cash reserve bank account equal to 15% of the value of Copytech's lease contracts. The reserve was designed to cover Copytech's monthly service costs in the event that a customer defaulted on monthly payments and to protect the banks in the event that Copytech went out of business. To avoid the requirement of maintaining such a reserve account, Copytech altered its contracts with customers to state that the customer alone bore responsibility for service. Simultaneously, however, Copytech entered into separate contract addenda with the customers that shifted responsibility for servicing the leased copy equipment back to Copytech. Copytech then sent the revised leases to the banks from which it was seeking funding, but did not send the banks the service addenda. By withholding the service addenda, Copytech concealed its service and maintenance obligations from the banks, and thereby obtained funding without having to maintain cash reserves to cover service costs. Pet. App. 4a-6a.

Also to obtain financing for Copytech, respondents provided the O'Bannon Bank with unconditional personal loan guarantees purportedly signed by respondents' wives. In fact, respondents had forged the signatures of their wives. Count One of the indictment alleged a conspiracy to violate Section 1014 by making false statements to federally insured banks to influence their actions, in violation of 18 U.S.C. 371. The conspiracy charge was based on respondents' concealment of the hidden service costs of CMP

contracts in their dealings with the banks and on respondents' submission of the forged personal loan guarantees purportedly signed by their wives. Count Two alleged a substantive violation of Section 1014 based on the submission to O'Bannon Bank of the forged personal loan guarantees. Pet. App. 6a-7a, 18a.

2. The district court instructed the jury that the elements of the offense described by Section 1014 are (1) that the bank was federally insured; (2) that the defendant knowingly made or caused to be made a false statement to the bank as alleged in the indictment; and (3) that the defendant made that false statement "for the purpose of convincing the bank to purchase lease contracts." Pet. App. 22a. The court further instructed that "[a] statement is 'false' when it is untrue when made or effectively conceals a material fact." *Ibid.* The court then instructed that the "materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant." *Id.* at 22a-23a. Following Eighth Circuit precedent, see *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (1990), the court itself determined that the statements had been materially false. Pet. App. 8a & nn.3-4.[3]

3. The court of appeals vacated respondents' convictions and remanded for a new trial. Pet. App. 1a-20a. The court of appeals noted that, while the case was pending on appeal, this Court had held, in *United*

[3] Respondents had requested that the jury be instructed that materiality was an element of the offense, and objected to the district court's decision not to give that instruction. Pet. App 7a n.3.; see also J.A. 36-37.



*States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995), that, when materiality is an element of an offense, the defendant's Sixth Amendment right to a jury trial mandates that the jury determine whether that element has been established. The court of appeals held that, in light of *Gaudin*, the district court had erred in not submitting the materiality of the false representations to the jury. Pet. App. 7a-9a & n.3.

The court of appeals rejected the argument that, because the term "material" does not appear in Section 1014's definition of the offense, materiality is not an element of that offense. The court of appeals noted that it had previously held that materiality is an element of the offenses described by 18 U.S.C. 1001 and 18 U.S.C. 287, although "neither statute lists materiality as an element of the crime." Pet. App. 11a (citing *United States* v. *Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980)).[4] The court of appeals found "no

[4] Section 1001 (18 U.S.C.) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

Section 287 (18 U.S.C.) provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to

reason to treat § 1014 any differently from the similarly worded §§ 287 and 1001." Pet. App. 12a. The court of appeals further observed that a majority of the courts of appeals have held that materiality is an element of Section 1014. *Ibid.* The court rejected the argument that those courts have inquired into materiality in reviewing convictions under Section 1014 in order "to exclude trifles from its coverage," not because materiality is "a statutorily required element of the crime." *Id.* at 13a. Rather, the court of appeals stated, the canon that, "[w]hen dealing with a pervasive, all-encompassing statute, * * * courts must be extremely careful to insure that reasonable limits are observed" justifies reading a materiality element into Section 1014. Pet. App. 13a (quoting *United States* v. *Beer*, 518 F.2d 168, 171 (5th Cir. 1975)).[5]

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be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

[5] The court of appeals rejected respondents' claim that the evidence at trial was insufficient to support the convictions. In finding the evidence sufficient to establish that the false statements that formed the principal basis of Count One were material, the court of appeals held that the fact that banks had required reserve accounts as a precondition to financing the CMP leases "is sufficient to support a finding that the withheld information was material, or in other words, had the capacity to influence the financial institutions." Pet. App. 18a. In finding the evidence sufficient to establish that the false statements that formed the basis of Count Two were material, the court of appeals held that "[t]he fact that O'Bannon Bank asked the defendants to have their wives sign unconditional loan guarantees supports a reasonable inference that personal loan guarantees from the defendants' spouses would have the capacity of influencing the bank." *Ibid.* Because the convictions were vacated, the court of appeals did not have occasion to address the sentencing issues that the government had raised in a cross-appeal. *Id.* at 19a.



## SUMMARY OF ARGUMENT

A. As this Court has long held, the definition of the elements of a criminal offense is entrusted to the legislature, and "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). Section 1014 of Title 18 provides that it is a crime when any person "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The text of Section 1014 does not contain a materiality requirement. In light of Congress's provision of an express materiality requirement in many other false-statement statutes, Congress's intent to exclude materiality from the elements required to establish a violation of Section 1014 is clear.

The history of Section 1014 also demonstrates that Congress did not intend that materiality be an element of the offense. Section 1014 was enacted in 1948 as a consolidation of 13 previous false-statement and overvaluation statutes that had governed different financial or credit institutions. Of those statutes, three included an express materiality limitation, while the remaining ten statutes did not. The decision to pattern Section 1014 on the statutes that did not require a showing of materiality bespeaks Congress's intention that materiality would not be an element of the new statute. Moreover, in 1948 this Court had held, in *Kay* v. *United States*, 303 U.S. 1

(1938), that materiality was not an element of Section 8(a) of the Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 134, 12 U.S.C. 1467(a) (1946), a predecessor statute to Section 1014. It is appropriate to presume that Congress was familiar with the holding in *Kay*. In closely patterning Section 1014 on Section 8(a), Congress manifested its understanding that the new statute would be construed similarly, *i.e.*, not to contain a materiality element.

Finally, imputing a materiality element to Section 1014 is inconsistent with the decision in *Kungys* v. *United States*, 485 U.S. 759 (1988). In *Kungys*, the Court held that materiality was not an element of an immigration statute that, like Section 1014, prohibited the making of a false statement for designated purposes. The Court in *Kungys* noted that the text of the statute at issue did not differentiate between material and immaterial false statements, and it held that the statute "means precisely what it says." *Id.* at 780. The logic of *Kungys* is equally applicable to Section 1014.

B. The court of appeals believed that a materiality requirement is necessary in order generally to exclude from prosecution trivial false statements incapable of influencing a bank. That purpose, however, is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made a false statement, but that he did so "for the purpose of influencing in any way the actions" of a covered financial institution. As numerous courts have recognized, a defendant's intent to influence a bank's actions will usually be established as an inference from the actual materiality of the false statement itself. In any event, Congress is entitled to prohibit



persons from knowingly making a false statement to a bank for the purpose of influencing the bank, without requiring proof of the actual materiality of that statement.

The court of appeals also drew an analogy to 18 U.S.C. 287 and 18 U.S.C. 1001, both of which, in the court's view, are subject to a materiality limitation. It is open to question whether materiality is an element of every offense under those two statutes. In any event, Section 287 and Section 1001 are both worded differently from Section 1014, and the interpretation of those statutes therefore does not bear on the interpretation of Section 1014.

## ARGUMENT

### THE MATERIALITY OF THE FALSE STATEMENT OR REPORT IS NOT AN ELEMENT OF THE OFFENSE DEFINED BY 18 U.S.C. 1014

Section 1014 of Title 18 imposes criminal penalties on any person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The text of Section 1014 does not include a materiality requirement. The court of appeals' decision to read such a requirement into the statute conflicts with the fundamental principle that the task of defining the elements of a criminal offense is entrusted exclusively to Congress. It is also inconsistent with the history of Section 1014, and with this Court's construction of a predecessor statute in *Kay* v. *United States*, 303 U.S. 1 (1938). Finally, even if policy considerations were relevant to this issue, there is no persuasive policy justification for grafting such a requirement onto the statute.

### A. Imputing A Materiality Requirement To Section 1014 Is Inconsistent With The Text And History Of The Statute And With This Court's Decision In *Kay* v. *United States*

1. This Court has long made clear that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Thus, "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986).

Applying those principles, the Court has consistently held that courts may not alter the legislative definition of a criminal offense by adding elements that have no basis in the statutory text. Most recently, in *United States* v. *Shabani*, 115 S. Ct. 382 (1994), the Court unanimously rejected the argument that courts should impute to the drug conspiracy statute, 21 U.S.C. 846, a requirement that a conspirator have committed an overt act in furtherance of the conspiracy. The Court noted that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt act requirement. The Court accordingly held that, "[i]n light of this additional element in the general conspiracy statute, Congress' silence in § 846 speaks volumes." 115 S. Ct. at 385. Relying on precedents construing the general conspiracy statute to contain an overt act element was error, the Court held, in light of "the textual variations between the two provisions." *Ibid.*



Similarly, in *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798 (1994), the Court rejected the argument that, for a defendant to be convicted of violating the federal racketeering statute, 18 U.S.C. 1962, it must be shown that the racketeering enterprise "be accompanied by an underlying economic motive." 114 S. Ct. at 803. While the racketeering statute broadly defines the term "enterprise," the Court noted, "nowhere in [the statute] is there any indication that an economic motive is required." *Id.* at 804; see also *id.* at 805; *United States* v. *Turkette*, 452 U.S. 576, 581 (1981) (rejecting claim that, to establish violation of racketeering statute, it must be shown that the enterprise was "legitimate," and noting that, "[h]ad Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate'"); *United States* v. *Culbert*, 435 U.S. 371, 373 (1978) (rejecting claim that, to establish violation of the Hobbs Act, 18 U.S.C. 1951, it must be shown that defendant engaged in "racketeering" activities, and noting that "the absence [in the statute] of any reference to 'racketeering'—much less any definition of the word—is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation").

2. The principle that Congress's definition of the elements of a criminal offense is controlling compels the conclusion that, to prove a violation of Section 1014, it is not necessary to establish that the false statement or report made to a financial institution was material to that institution's decision. Section 1014 is one of a number of statutes that punish the making of false statements in different contexts. Some of those statutes contain a textual

materiality requirement. See, *e.g.*, 18 U.S.C. 922(a)(6) (false statement on firearms application); 18 U.S.C. 1033(a)(1) (false statement on insurance document); 18 U.S.C. 1621 (perjury); 18 U.S.C. 1623 (false declarations before grand jury or court); 18 U.S.C. 1919 (false statement to obtain unemployment compensation for federal service); see also 10 U.S.C. 931 (perjury in proceedings governed by Uniform Code of Military Justice); 19 U.S.C. 1919 (false statement for purpose of influencing action of Secretary of Commerce); 19 U.S.C. 2316 (false statement for purpose of increasing certain government payments); 22 U.S.C. 618(a)(2) (false statement in a foreign-agent registration statement); 29 U.S.C. 439(b) (false statement in reports to Secretary of Labor). Other statutes, however, including Section 1014, do not.[6]

In light of Congress's express inclusion of a materiality requirement in other false-statement statutes, the absence of the term "material" from Section 1014

[6] See, *e.g.*, 15 U.S.C. 645 (false statements for purpose of influencing the Small Business Administration); 15 U.S.C. 714m (Commodity Credit Corporation); 18 U.S.C. 1007 (Federal Deposit Insurance Corporation); 18 U.S.C. 1010 (Department of Housing and Urban Development and Federal Housing Administration); 18 U.S.C. 1015 (relating to naturalization, citizenship, or alien registry); 18 U.S.C. 1026 (certain Department of Agriculture programs); 18 U.S.C. 1158 (Indian crafts); 22 U.S.C. 1980(g) (compensation for commercial fishing vessels); 22 U.S.C. 2197(n) (Overseas Private Investment Corporation); 30 U.S.C. 941 (black lung benefits); 33 U.S.C. 931 (longshore and harbor workers' compensation); 42 U.S.C. 3220 (certain economic development funds administered by the Secretary of the Treasury).



"speaks volumes." *Shabani*, 115 S. Ct. at 385. The text of Section 1014 instead makes clear that:

> To obtain a conviction under [Section] 1014, the Government must establish two propositions: it must demonstrate (1) that the defendant made a "false statement or report," or "willfully overvalue[d] any land, property or security," and (2) that he did so "for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance, . . . commitment, or loan."

*Williams* v. *United States*, 458 U.S. 279, 284 (1982). It is not necessary also to establish that the false statement or report was material to the financial institution's action. See *ibid.* (listing elements of a Section 1014 violation, without mentioning materiality).[7]

3. The history of Section 1014 further demonstrates that Congress did not intend materiality to be an element of the offense it described. Section 1014 was enacted in 1948. It represented a codification, in a single section of Title 18, of 13 separate false-statement and overvaluation statutes that previously had governed false statements to different financial or credit institutions. *Williams*, 458 U.S. at 288; see 18 U.S.C. 1014, Reviser's Note (1952). Of those 13 statutes, ten did not include a textual materiality

[7] Although the question whether materiality is an element of Section 1014 was not presented in *Williams*, the Court's recitation of the elements of Section 1014 without reference to materiality may be significant in that, as the Court noted, the district court in *Williams* had instructed the jury that materiality was an element of the offense. See 458 U.S. at 283.

requirement, while three others did.[8] Congress's decision to pattern Section 1014, the consolidated statute, on those predecessor statutes that did not contain a textual materiality requirement, rather than on the predecessor statutes that did, is consistent only with an understanding that materiality would not be an element of the new statute.[9]

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[8] The three predecessor statutes that included a textual materiality requirement were 7 U.S.C. 1026(a) (1946), 12 U.S.C. 596 (1946), and 12 U.S.C. 1138d(a) (1946). Of the ten predecessor statutes containing no reference to materiality, seven, like Section 1014, required that the false statement be "for the purpose of influencing" the action of the specified institution or "for the purpose of obtaining" certain benefits. See 7 U.S.C. 1514(a) (1946); 12 U.S.C. 1122, 1248, 1312, 1441(a), 1467(a) (1946); and 15 U.S.C. 616(a) (1946). The remaining three statutes proscribed the making of a false statement without requiring either that the statement be material or that it be made for a particular purpose. See 12 U.S.C. 981, 1123, 1313 (1946).

[9] The diversity among those predecessor statutes also reveals that there is no background principle that would justify reading a materiality requirement into Section 1014. As the predecessors to that provision show, Congress has long recognized that, in particular contexts, knowing false statements warrant criminal punishment without regard to whether those statements are shown to be material. This case thus presents a question distinct from the issue whether an intent element should be imputed to a statute whose text does not refer to the defendant's *mens rea*. The Court has taken "particular care * * * to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples*, 114 S. Ct. at 1799 (quoting *Liparota*, 471 U.S. at 426). A defendant who has willfully made a false statement "for the purpose" of influencing the action of a bank, however, has not engaged in "apparently innocent conduct." *Staples*, 114 S. Ct. at 1799.



Moreover, ten years before the enactment of Section 1014, this Court had construed a similarly worded predecessor statute to Section 1014 in *Kay* v. *United States*, *supra*. At issue in *Kay* was Section 8(a) of the Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 134, 12 U.S.C. 1467(a) (1946). Section 8(a) made it a crime to make

> any statement, knowing it to be false, or [to] willfully overvalue[] any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act * * *.

*Kay*, 303 U.S. at 3 & n.1. Kay was the second mortgagee of a property on which a loan had been sought from the Home Owners' Loan Corporation. She had overstated the amount of her claim against the property in a consent form to accept bonds of the Corporation in full settlement of her debt. *Id.* at 5. On appeal, she challenged her conviction on the ground that her false statements had been immaterial, because "any statement in the consent of a second mortgagee as to the balance due cannot endanger or directly influence any loan made by the Corporation." *Ibid.*

This Court unanimously rejected Kay's claim. It held that the materiality of the false statement was not an element of the offense described by Section 8(a):

> It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important.

> There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense.

303 U.S. at 5-6.

Section 1014 parallels Section 8(a) in all relevant respects. Both statutes criminalize the willful making of a false statement to a covered financial institution, provided that the defendant has made the false statement "for the purpose of influencing in any way the action" of that institution. Neither statute includes the term "material." A holding that materiality is an element of Section 1014 therefore cannot be squared with *Kay*, or with the absence from Section 1014 of any materiality requirement. Moreover, the statute involved in *Kay* was one of the predecessors to Section 1014, see note 8, *supra*, and it is appropriate to presume that Congress was familiar with that holding. See *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1930 (1995). It is thus untenable to assume that Congress in 1948, despite this Court's construction in *Kay* of the language in Section 8(a), expected *sub silentio* that the parallel language of Section 1014 would receive a diametrically opposite interpretation. On the contrary, the Reviser's Note to Section 1014 states that, with exceptions not relevant here, the 1948 consolidation of the 13 false-statement statutes was not intended to



effect any "change of substance." See 18 U.S.C. 1014, Reviser's Note (1952).[10]

4. Finally, imputing a materiality requirement to Section 1014 is inconsistent with this Court's analysis in *Kungys* v. *United States*, 485 U.S. 759 (1988). In that case, the Court examined the requirements of a false-statement statute that, like Section 1014, does not use the term "material." The statute in *Kungys*, 8 U.S.C. 1101(f)(6), provided that a person shall be deemed not of good moral character for certain purposes under the immigration laws, and hence not entitled to be naturalized, if he has given "false testimony for the purpose of obtaining" immigration or naturalization benefits. The Court held that Section 1101(f)(6) does not require that the false testimony be material. 485 U.S. at 779. The Court

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[10] Nor have the subsequent amendments to Section 1014 altered the type of conduct which Section 1014 proscribes. Rather, each amendment has merely expanded the list of financial institutions to which the statute applies, see *Williams*, 458 U.S. at 288; the congressional reports on the amendments tracked the language of the statute and did not use the term "materiality." See H.R. Rep. No. 2060, 85th Cong., 2d Sess. 19 (1958) (amendment adding small-business investment companies made it a crime "for any person knowingly to make any false statement or report or willfully to overvalue any property or security for the purpose of influencing the action of a small-business investment company"); S. Rep. No. 1078, 88th Cong., 2d Sess. 2 (1964) (amendment adding federal credit unions made it a crime "for anyone knowingly to make a false statement or report or willfully overvalue any land, property, or security to influence the action of a federal credit union in connection with any application, loan, or the like"); H.R. Rep. No. 1556, 91st Cong., 2d Sess. 70-71 (1970) (amendment adding federally insured elements describing the offense as proscribing "false statements or reports in connection with loans or other similar transactions").

explained its refusal to read such an element into the statute as follows:

> On its face, § 1101(f)(6) does not distinguish between material and immaterial representations. Literally read, it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration benefits. We think it means precisely what it says.

*Id.* at 779-780. The analysis in *Kungys* is equally applicable to Section 1014.

**B. There Is No Basis For Imputing A Materiality Element To Section 1014**

1. Notwithstanding the lack of a textual requirement of materiality, the majority of the courts of appeals, including the Eighth Circuit in this case, treat materiality as an element of Section 1014, thereby requiring the government to establish that the statement had "a natural tendency to influence, or [be] capable of influencing, the decision of the [institution] to which it was addressed." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (quoting *Kungys*, 485 U.S. at 770).[11] To the extent that those

[11] See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), petitions for cert. pending, Nos. 95-1745 (filed Apr. 26, 1996) & 95-8569 (filed Mar. 29, 1996); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *Theron* v. *United States Marshal*, 832 F.2d 492, 496-497 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Haddock*, 956 F.2d 1534, 1549 (10th Cir.), cert. denied, 506 U.S. 828 (1992); *United States* v. *Rapp*, 871 F.2d 957, 963-964 (11th Cir.), cert. denied, 493 U.S. 890 (1989); but see *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977) (holding, based on *Kay*, that materiality is not an element of Section 1014), cert. denied, 435 U.S. 915 (1978).



courts have explained the addition of a materiality element, they have generally stated that it is necessary to exclude from prosecution under Section 1014 trivial false statements incapable of influencing a bank. See, *e.g.*, *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); Pet. App. 13a (addition of materiality element ensures "that reasonable limits are observed"). For two reasons, that argument is unsound.

First, a similar purpose is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made a false statement, but that the defendant made the false statement "for the purpose of influencing in any way the actions" of a covered financial institution. 18 U.S.C. 1014. That requirement narrows the scope of Section 1014 to statements that the defendant subjectively believes would prompt the bank to act, an intent that would rarely exist (or be capable of being proved) when the statement made or fact concealed was trivial in character. Thus, a person who makes an immaterial false statement solely for a purpose other than to influence the bank (*e.g.*, to keep a private matter confidential) does not violate the statute. See *United States* v. *Lopez*, 71 F.3d 954, 961 (1st Cir. 1995) (proof of the requisite "purpose of influencing" will usually require an inference from proof of actual materiality), petitions for cert. pending, Nos. 95-1745 (filed Apr. 26,

1996) & 95-8569 (filed Mar. 29, 1996); *United States* v. *Thurnhuber*, 572 F.2d 1307, 1309 n.1 (9th Cir. 1977) ("An individual is not likely to provide immaterial and unimportant information in the hope of influencing a bank's action"); see also *Staniforth*, 971 F.2d at 1357-1358 ("the less material the statement was, the less likely it was to have been made for the purpose of influencing the bank"). There is no reason to conclude that Congress intended an additional, implicit materiality requirement to serve the same purpose of limiting the coverage of the statute. As this Court noted in *Kungys*, in holding that is unnecessary to read a materiality limitation into a statute prohibiting the making of a false statement for the purpose of obtaining certain immigration benefits:

> Obviously, it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision regarding immigration or naturalization benefits was nonetheless made with the subjective intent of obtaining those benefits. This is especially so since the invalidating intent * * * must be proved by "clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt."

485 U.S. at 780-781 (citation omitted). That analysis has even greater force as applied under Section 1014, because the intent element under that provision must be established beyond a reasonable doubt.

Second, there are sound reasons for Congress to make it an offense where a false statement was made for the purpose of influencing a bank, even though materiality cannot be established. A statute that penalizes all false statements made for the purpose of



influencing banks, without regard to the materiality of those statements, may have the salutary effect of deterring the making of false statements to banks generally. It may also reflect a judgment that the willful making of a false statement for the purpose of influencing a bank is a form of "morally unacceptable" conduct that warrants punishment, regardless of whether that conduct has the capacity for visiting actual harm upon a bank. See *Kungys*, 485 U.S. at 780. To deviate from the "natural meaning" of Section 1014 by imposing an additional materiality requirement, *id.* at 781, would therefore decriminalize a category of potential wrongdoing that Congress was entitled to deter and punish through a criminal sanction. See *Kay*, 303 U.S. at 5-6 ("There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead").

2. The court of appeals in this case also subjected Section 1014 to a materiality limitation because both 18 U.S.C. 1001 and 18 U.S.C. 287 have been held by some lower courts to contain a materiality element, and because it saw no "reason to treat [Section 1014] any differently." Pet. App. 12a; see *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987) (also basing interpretation of Section 1014 on precedent construing Section 1001). Reliance on those holdings was error. First, it is open to question whether the courts that have held materiality to be an element of Section 1001 and Section 287 have been correct in so holding. See *Gaudin*, 115 S. Ct. at 2320 (Rehnquist, C.J., concurring) (addressing Section 1001).[12] The

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[12] Compare *United States* v. *Taylor*, 66 F.3d 254, 255 (9th Cir. 1995) (materiality is not an element of Section 287),

text of Section 287, like that of Section 1014, does not contain a materiality limitation. And, of the three clauses of Section 1001, only the first contains the term "material." See note 4, *infra*.

In any event, both Section 287 and Section 1001 are worded differently from Section 1014, and the interpretation of those statutes therefore does not control the interpretation of Section 1014. Neither statute contains the distinctive intent requirement of Section 1014, which, as we have discussed, largely serves the purpose of a materiality requirement in limiting the scope of conduct rendered criminal under

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petition for cert. pending, No. 95-8279 (filed Mar. 15, 1996); *United States* v. *Elkin*, 731 F.2d 1005, 1009-1010 (2d Cir.) (the "language of § 287 in no way suggests that materiality is an element of the offense"), cert. denied, 469 U.S. 822 (1984); *United States* v. *Irwin*, 654 F.2d 671, 682 (10th Cir. 1981) (materiality is not an element of Section 287), cert. denied, 455 U.S. 1016 (1982), with *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974) (stating in dicta that materiality is an element of Section 287). In stating that materiality is an element of Section 287, the Eighth Circuit below relied on its opinion in *United States* v. *Adler*, 623 F.2d 1287, 1291 n.5 (1980). In that case, however, the parties did not address that question specifically, and the court stated that, for the purposes of deciding the case, it would "treat materiality as an essential element." *Ibid.* Because the court of appeals in *Adler* found that the statements and claims were in fact material, it was not necessary in that case to decide the question whether materiality is an element of Section 287 or Section 1001. *Id.* at 1291-1292. See also *United States* v. *Carter*, 526 F.2d 1276, 1278 (5th Cir. 1976) (where statute, 15 U.S.C. 645(a), does not include term "material" but instead proscribes making of a false statement for purpose of influencing Small Business Administration, government is not required "to show that the particular statement would have, in fact, affected the action of the S.B.A.").



the statute. Moreover, because the first clause of Section 1001 contains the term "material," there is a textual basis for concluding that all prosecutions under that statute are subject to a materiality limitation. And, with regard to Section 287, that statute does not apply at all to false statements, but, instead, to "false, fictitious, or fraudulent" "claims upon or against the United States." See 18 U.S.C. 287.

3. Finally, the addition of a materiality element to Section 1014 would unnecessarily burden prosecutions under that statute. Under this Court's decision in *Gaudin*, when materiality is an element of an offense, it must be decided by the jury. Conditioning a conviction on the jury's having found the existence of an element extraneous to the text of a statute heightens the chances that, solely as a result of speculation or confusion regarding that extra element, a jury will not return a verdict of guilty that it otherwise regards as warranted.

The addition of a materiality element in cases brought under Section 1014 poses a particular risk of such speculation or confusion, because jurors will often have had personal experiences with financial and credit institutions. Despite a legal standard that focuses inquiry on whether the false statement had "a natural tendency to influence" a decision of the financial institution, *Gaudin*, 115 S. Ct. at 2313, jurors may be inclined improperly to inquire, based on their own experiences, whether the bank's action on the particular loan application or other submission at issue would in fact have been any different absent the falsehood. While it is appropriate to require the government to establish materiality when a defendant is charged with an offense that makes materiality an

element, it is unnecessary, distracting, and burdensome to require trial on that issue when Congress has not made materiality an element of the offense.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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